IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 441

UNITED STATES OF AMERICA, *Petitioner*

v.

AARON ZACKS and FLORENCE ZACKS

On Petition for a Writ of Certiorari to
The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the Court of Claims (Pet. 22-26) is reported at 280 F. 2d 829.

JURISDICTION

The judgment of the Court of Claims was entered on July 6, 1962 (Pet. 27). The petition for a writ of certiorari was filed on December 3, 1962, pursuant to an extension of time. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Does the 1956 remedial and retroactive amendment of the Internal Revenue Code of 1939 implicitly give the taxpayers a cause of action as to the year 1952 which is not barred by the general two or three-year statutes of limitation?

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * * * * * *

(q) [as added by Sec. 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404] *Transfer of Patent Rights.*—

(1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

* * * * * * * * *

(4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

(26 U. S. C., Supp. V, Appendix, 117.)

SEC. 322. REFUNDS AND CREDITS.

• • • • • • • • • •

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

• • • • • • • • • •

STATEMENT

For the calendar year 1952 taxpayers as husband and wife filed a timely Federal income tax return. In it they reported as ordinary income in excess of $36,000.00 which they had received as patent royalties. This action was in accord with the then existing rulings of the Internal Revenue Service. (Pet. 23, 29.)

On June 29, 1956, Congress enacted Public Law 629 which added §117(q) to the Internal Revenue Code of 1939. The new statute provided that qualifying patent royalties received during the years 1950 through 1954 were to be taxed as long-term capital gains to accord with the treatment given this type of income by §1235 of the Internal Revenue Code of 1954 (Pet. 3).

On or about June 23, 1958, taxpayers filed a claim for refund on Treasury Department Form 843 in which they sought to recover the difference between the tax as ordinary income and the tax as long-term capital gain on the patent royalties received by them during

1952 (Pet. 28). More than six months elapsed without any action having been taken by the Commissioner of Internal Revenue with regard to the aforesaid claim for refund (R. 1-4).

This suit was filed on March 5, 1959. In its answer filed on May 4, 1959, the Government asserted as a second defense that the applicable statutes of limitation prevent a recovery in this proceeding (R. 7-8; Pet. 28). The issue was presented to the Court of Claims on a motion filed by taxpayers to strike the second defense (R. 9). This motion was granted (Pet. 26).

ARGUMENT

The decision below is correct. Any fundamental conflict of principles that may exist was also in existence when the Government opposed certiorari in *Dempster* v. *United States*, 361 U. S. 819. The decision below presents no question warranting review by this Court.

1. In deciding the case at bar the Court of Claims relied on two cases—*Verckler* v. *United States*, 170 F. Supp. 802, and *Hollander* v. *United States*, 2 Cir., 248 F. 2d 247 (Pet. 25-26). Those two cases formed the primary basis for the petition for certiorari in *Dempster* v. *United States*, 361 U. S. 819 (October Term, 1959, No. 135, Petition, p. 7). In opposing that petition the United States said in part (Brief in Opposition, pp. 10-11):

> On the question of whether Section 117(q) impliedly extended the three-year statute of limitations provided in Section 322(b)(1), there is no direct conflict of authority. The cases cited by taxpayer (Pet. 10) involved different statutory provisions and different situations. Thus, *Hollander* v. *United States*, 248 F. 2d 247 (C.A. 2),

> involved remedial legislation designed to provide retroactive tax relief for estates of decedents under circumstances where, as the Second Circuit said, Congress must have known that the application of the bar of Sections 910 and 911 of the Internal Revenue Code of 1939 upon the filing of refund claims and instituting suits for recovery would probably have nullified the relief proposed. As pointed out above, this is not the situation here. Again, prior to the passage of the amending Act involved in *Verckler* v. *United States, supra,* which also was designed to provide tax relief to the estates of certain decedents, no cause of action existed and a taxpayer did not have a right to claim and receive a refund of the tax. (Footnotes ommitted.)

Since the Government found "no direct conflict of decisions, and no other basis warranting review" when the *Dempster* petition was pending, and since the present proceeding is merely a repetition of the *Hollander-Verckler* principles, it is submitted that this petition should be denied for the same reasons urged effectively in the *Dempster* case.

2. The 1956 legislation here involved gave to professional inventors rights which they did not have prior to the amendment and it materially changed for capital gain purposes the holding-period requirements regarding patents. These basic changes are conceded in the pending petition for a writ of certiorari (p. 14, fn. 10). It is unrealistic to think that Congress in 1956 would make such fundamental changes of a remedial nature in the tax laws, would make the revisions effective for the years 1950 to 1954, and at the same time intend that the benefit of these changes for the first few years would be barred by the general statutes of limitation. Had Congress not intended this legislation to be effec-

tive for the otherwise barred years, its application to 1950, 1951, and 1952 was certainly "an idle gesture" as noted by the Court below (Pet. 25). It seems far-fetched to attempt to answer this interpretation by asserting (Pet. 11-12) that Congress intended to benefit only the litigious taxpayers and not those who were following the administrative rulings.

3. The Government urges that this proceeding involving a judgment of $4,624.09 (Pet. 27) is important because of its effect on certain railroad legislation involving millions of dollars (Pet. 16, fn. 14). If this railroad problem is the real concern of the Government, then it is submitted that the time to consider the Retirement-Straight Line Adjustment Act of 1958 is *after* that statute has been construed by the lower courts and not in anticipation thereof by indirection in a relatively unimportant patent case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1962